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No. 94-7427

In The Supreme Court of the United States October Term, 1994

JOSEPH V. LIBRETTI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF OF FORFEITURE ENDANGERS AMERICAN RIGHTS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Forfeiture Endangers American Rights Foundation (F.E.A.R. Foundation) is a nonprofit organization to reform asset forfeiture laws to restore due process and protect property rights in the forfeiture process.

F.E.A.R.'s platform is set out in a position paper published in 1992.[1] We advocate criminal due process safeguards for all forfeitures, and enhanced protections for innocent owners and third parties. We seek an end to the practices of letting the seizing agencies benefit from the proceeds of property seized, and of letting federal agencies adopt state seizures.

Our membership is composed of concerned citizens, forfeiture victims, and lawyers. The concerned citizens active in our cause include doctors, writers, social scientists, professors, businessmen, and other professionals. A former U.S. Congressman serves on our Board of Directors. Individual lawyer/members have represented forfeiture victims in a wide range of constitutional issues regarding forfeiture law.

Our interest in this case is twofold. First, F.E.A.R. is concerned with the overwhelming numbers of forfeiture cases that are settled (or lost by default) prior to trial -- without *any* court determination of a factual basis for the forfeiture. We believe that too often this reflects the victims' unfair bargaining position, rather than the strength of the government's case. When the pretrial seizure of assets destroys the victims' financial ability to defend their property, victims often have no choice but give the government what it wants, whether forfeiture is factually justified or not. A government agency motivated to enhance forfeiture revenues should not be allowed to punish without judicial oversight.

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[1] The paper, "Federal Forfeiture Laws Need To Be Amended To Restore Due Process And Protect the Property Rights of Innocent People: F.E.A.R.'s Proposal For Reform," is available from F.E.A.R.'s website on the Internet (http://www.calyx.com/~fear), on the "Legislation and Lobbying" page.

Secondly, the underlying principle in the Tenth Circuit's opinion -- that forfeiture is "merely punishment" and not a substantive offense -- has been used to reduce due process in criminal forfeitures. F.E.A.R. has fought long and hard to raise due process requirements in civil forfeiture cases. We do not want to see criminal forfeiture lose due process protections.

Broad principles are needed to guide the lower courts in providing the process that is due *all* forfeiture victims. Otherwise, every advance we make in one area of forfeiture law will be offset by an equal setback in another area, as government agencies struggle to maintain the stream of income upon which they have become dependent.

STATEMENT OF THE CASE

The facts are set out in petitioner's brief, and we will only briefly summarize them here.

Joseph V. Libretti pleaded guilty to operating a continuing criminal enterprise (hereafter "CCE"). The plea agreement specified "forfeiture of all known assets as prescribed in 21 U.S.C. §853 and assets which are discovered at any later time up to $1,500,000." Paragraph 9 required Libretti to identify all his assets used to facilitate criminal activity, and to complete financial disclosure forms identifying all assets. Paragraph 10 required him to transfer all "his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General" -- including, but not limited to specific property.

At the Rule 11 hearing, the judge advised Libretti that if he pleaded guilty he would waive the right to a jury trial, but did not explain that he had a right to trial by

jury on whether each asset was forfeitable. In advising Libretti of the potential punishment he was facing, the judge stated that "all the property that's described in Count 6 could be forfeited to the United States." When Libretti asked the judge whether the government could forfeit one and a half million dollars from him at any time, the court told him that property that was not drug tainted could not be forfeited.

After sentencing Libretti to 20 years inprisonment, 5 years supervised release, a fine, and community service, the court stated "I think I have no alternative but to grant the forfeiture order and it is hereby granted." Libretti objected that the court had failed to find a factual basis for the forfeiture of all his property.

After Libretti filed his notice of appeal, the court held hearings on third party claims to the forfeited property. At the first hearing, Libretti argued that the condominium should not have been included in the forfeiture order because it was not purchased with proceeds. The court allowed the sale, but ordered that the proceeds be retained to permit Libretti to assert any claims he might have.

At another third party hearing, Libretti's parents claimed a parcel of property that Libretti had deeded to them in exchange for the money they paid for Libretti's defense. His parents claimed the property was purchased with legitimate income from his employment. The court reserved ruling on this claim.

The government's evidence about the source of the assets showed that Libretti had legitimate income from employment as an accounting supervisor at General Chemical, as well as a firearms business. They contended that his illegal drug profits amounted to a million dollars or more, and that drug proceeds may have been

comingled with legitimate income in Libretti's bank accounts, and may have been invested in his firearms business.

Libretti testified that he had earned approximately $50,000 per year in salary from General Chemical, and that the government had seized untainted assets along with drug proceeds. Libretti's attorney argued that though the government had demonstrated probable cause for forfeiture, Libretti could prevail in defending assets from forfeiture if he could show by a preponderance of the evidence that the property was not tainted. (This is the standard for civil forfeiture -- not criminal forfeiture.)

The court agreed and stated the case would be remanded to a magistrate to determine which assets were forfeitable. Before the hearing was held, the court granted the government's motion to stay the factfinding hearing pending the appeal.

On appeal, Libretti argued that the plea agreement was vague and ambiguous, and that he had agreed only to forfeit those items of his property named in the indictment which were forfeitable under the criminal forfeiture statute. He stated that he would not have knowingly and voluntarily agreed to forfeit all of his property whether tainted or not. *United States v. Libretti*, 38 F.3d 523, 529 (10th Cir. 1994).

The Tenth Circuit held that the district court was deprived of jurisdiction to consider Libretti's claims once he had filed a notice of appeal. It then held that the court was not required by Rule 11 to find a factual basis for the forfeiture of the assets, because forfeiture was part of the sentence rather than a substantive offense. 38 F.3d at 528.

Reviewing the question of the voluntariness of the plea de novo, the Tenth Circuit held that the plea was knowing and voluntary and that Libretti "unambiguously forfeited all of his property."

> The district court's extraneous statements that defendant was only forfeiting assets listed in the CCE count of the indictment or from his drug trade do not establish that defendant did not knowingly and voluntarily forfeit all of his property. Rather, defendant agreed to forfeit all of his assets, including some that on their face had no connection with his drug dealings.... Nothing in the agreement limits the forfeiture to those assets with an established factual basis for forfeiture. *Libretti*, 38 F.3d at 530.

SUMMARY OF ARGUMENT

This case presents two issues regarding the validity of a guilty plea forfeiting a defendant's property:

(1) whether the judge is required to inform the defendant that he has a right to trial on the issue of the forfeitability of the property, and

(2) whether the judge must find a separate factual basis for each count to which the defendant is pleading guilty, including criminal forfeiture counts.

Central to the determination of both issues is the question of whether a criminal forfeiture count is a substantive count, or merely an additional sanction for a separate criminal offense.

ARGUMENT

In 1984, the Omnibus Crime Control Act overhauled the federal asset forfeiture laws by vastly expanding police seizure powers, creating a host of new forfeitable offenses, and allowing the seizing agencies to keep the proceeds of their seizures.

As the Institute for Justice pointed out in their amicus brief in *United States v. James Daniel Good Real Property*, p. 11:

> After law enforcement agencies were granted a direct financial incentive to initiate and prosecute forfeiture actions, the use of the new statute and revenues generated by civil forfeiture skyrocketed. Proceeds from civil forfeiture increased from $27 million in 1985 to $644 million in 1991, *an increase of over 1500 percent. See* U.S. Dep't of Justice, Federal Forfeiture of the Instruments and Proceeds of Crime: The Program in a Nutshell 1 (1990). From 1984 to 1990, the U.S. government has forfeited property worth approximately $1.5 billion. *Foreword* to U.S. Dep't of Justice, *1990 Annual Report for the Department of Justice Asset Forfeiture Program.*

The government's appetite for property has not diminished. The most recent Justice Department annual report, for fiscal year 1993,[2] shows the cumulative income from Justice Department forfeitures doubled between

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[2] No 1994 annual report has been published yet. We have been told by the Department of Justice that their annual report will no longer be available publicly -- henceforth it would be available only by Freedom of Information Act request.

1990 and 1993 -- from $1.5 billion to $3.24 billion. Figures released by Representative Henry Hyde at his June 22, 1995 press conference[3] show the Department of Justice made over $500 million in profits from forfeiture in 1994. See Exhibit A.

The Treasury Department's figures probably double the total amount forfeited since 1985, but Treasury's annual reports are not clear about the amount of income attributable to forfeiture.

During the eleven years since Congress enacted "modern" forfeiture laws, reports of abuses have been legion. Exposes in various newspapers and magazines[4] show the abuses are widespread and growing. U.S. Representative Henry Hyde (R. Ill.), chairman of the House

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[3] Representative Hyde held the press conference to announce the introduction of his forfeiture reform bill, HR 1916.

[4] *See e.g.*, "License To Steal -- Take It Away," by Robert C. Bauman, *National Review*, February 20, 1995; Steven B. Duke & Albert C. Gross, "Casualties of War," *Reason*, February 1994; "Policing For Profits," by Mark Flatten, *Tempe (Arizona) Daily News Tribune*, November 21 - 26, 1993; John Dillin, "Government's Big Grab: Civil Forfeiture," *Christian Science Monitor*, September 28 & 30, 1993, October 1, 4 & 5, 1993; Richard Miniter, "Ill-Gotten Gains," *Reason Magazine*, August/September 1993; Gary Webb, "The Forfeiture Racket" and "The Money Tree," *San Jose Mercury News*, August 29-30, 1993; Arthur S. Hayes, "Civil Forfeiture Laws Are Under Attack," *Wall Street Journal*, January 14, 1993; Peter Gorman, "Forfeiture: The Seizing Of America," *High Times Magazine*, November & December 1992; Dennis Cauchon, "Forfeiture Law Called Biased, Reckless," *USA Today*, October 1, 1992; "War On Drugs Hitting Innocent Citizens," by Mike O'Callaghan, *Las Vegas Sun*, October 3, 1992; Jeff Brazil and Steve Berry, "Tainted Cash Or Easy Money?" *Orlando Sentinel*, June 14-17, 1992 (this series won a Pulitzer Prize); Andrew Schneider & Mary Pat Flaherty, "Presumed Guilty: The Law's Victims In the War on Drugs," *Pittsburgh Press*, August 11 - 16, 1991 August 18, 1991, December 22, 1991; T. Poor and K. Rose, "Hooked On The Drug War," *St. Louis Post-Dispatch*, April 28 - May 5, 1991.

Judiciary Committee, recently published a book exposing the abuses and calling for reform. *Forfeiting Our Property Rights* (Cato Institute, 1995).

Relying on "legal fictions" instead of the Constitution, the lower courts have allowed the government to punish people through forfeiture without having to comply with the presumption of innocence, the right to counsel, the "beyond a reasonable doubt" burden of proof, the excessive fines clause, or any of the other due process rights which are ordinarily guaranteed when the government attempts to impose punishment. Property owners are at a severe disadvantage fighting the endless resources of the federal government -- especially when the government has seized all the persons assets prior to trial.

When this Court handed down five decisions limiting the government's forfeiture practices in the 1992 term it appeared there would soon be relief from the rampant abuses. Instead, the government has learned to dodge due process obstacles and launder due process violations. It is business as usual for the forfeiture squads.

This Court's rulings in *Austin v. United States*, __ U.S. __, 113 S.Ct. 2801, 125 L.Ed.2d 448 (1993) and *Alexander v. United States*, __ U.S. __, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) have had little effect. Disproportionate forfeitures are still rampant because the lower courts have not adopted a meaningful test for proportionality. The only case which has had a significant impact on seizure practices is *United States v. James Daniel Good Real Property*, __ U.S. __, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

Now the lower courts have begun lowering the due process in criminal forfeitures, reasoning, as the Tenth Circuit did below, that criminal forfeiture is not a

substantive offense but "merely punishment" for another offense, and therefore criminal due process safeguards do not apply.

It is time the government's abusive forfeiture practices are reigned in. Forfeiture is punishment -- not "*merely* punishment" but punishment in the same sense as any other criminal count. The forfeiture of private property -- taken for public use without just compensation, as punishment for an offense -- should require the same due process protection as any other punishment.

> The institutional arrangement and incentive structure behind civil forfeiture necessitates protection of the due process rights of property owners. Guaranteeing due process rights for property owners will help channel self-interest away from unjustified applications of forfeiture laws to boost agency revenue and toward genuine efforts to eliminate criminal activity. Amicus brief of Institute for Justice in *United States v. James Daniel Good Real Property*, No. 92-1180, p. 17.

Guilty pleas and the plea bargaining process

The right to trial is an essential component of due process. Although guilty pleas have their utility in decreasing the costs of criminal prosecutions, providing an early resolution of the case, and preserving judicial economy, this utility cannot justify the sacrifice of constitutional rights.

A defendant's agreement to give up his right to trial on forfeiture counts and all the due process rights

inherent therein -- *must* be knowing and voluntary. The Constitution cannot tolerate anything less.

The government has a superior advantage over the criminal defendant in the plea bargaining process. That is the reason for the constitutional requirement, codified in Rule 11 of the Federal Rules of Criminal Procedure, that the court take pains to ensure that the defendant understands what he is agreeing to and what the potential consequences of his plea will be.

The government's advantage over the defendant is magnified exponentially when the government is also allowed to strip the defendant of all of his financial resources, before trial -- forcing him to rely on court appointed counsel or represent himself, and destroying his ability to support himself and his family.

Add to that the government's powerful incentive to increase forfeiture revenue, and the reasons for judicial scrutiny increase.

Punishment or substantive?

Before *Austin, supra*, the government argued (and the courts agreed) that forfeitures should be exempted from due process protection because forfeiture was *not punishment*.

This Court held in *Austin* that forfeiture *is* punishment.[5] Now, twisting *Austin*'s reasoning beyond comprehension, the lower courts -- including the Tenth Circuit in this case -- say that forfeiture is "merely

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[5] *Austin* was a civil forfeiture case. Its companion case, *United States v. Alexander*, __ U.S. __, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) held that the same was true of criminal forfeitures.

punishment" and therefore, it does not require due process.

The argument that forfeiture is "merely punishment" and not a substantive offense has been used to lower the burden of proof in criminal forfeiture cases to "preponderance of the evidence" in many circuits.[6] It has also been used to dispense with the requirement that the court find a factual basis for a plea to a forfeiture count.[7]

Importance of property rights

The Constitution speaks of life, liberty and property in one breath. There is no reason why punishment by deprivation of property rights should be denigrated to a lesser status -- especially in a case such as this, where the forfeiture encompassed every asset the defendant owned, legitimate or not.

The Fifth Amendment "takings clause" says "nor shall private property be taken for a public use without just compensation." Forfeiture is apparently an exception to that rule. When private property is taken for public use under the forfeiture laws, the owner forfeits his right to just compensation.

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[6] *United States v. Bieri*, 21 F.3d 819, 821 (8th Cir. 1994); *United States v. Elgersma*, 971 F.2d 690, 693 (11th Cir. 1992); *United States v. Smith*, 966 F.2d 1045, 1052 (6th Cir. 1992); *United States v. Herrero*, 893 F.2d 1512, 1541-42 (7th Cir.), cert. denied, 496 U.S. 927, 110 S.Ct. 2623, 110 L.Ed.2d 644 (1990); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1577 (9th Cir. 1989); *United States v. Sandini*, 816 F.2d 869, 875 (3rd Cir. 1987).

[7] *United States v. Boatner*, 966 F.2d 1575 (11th Cir. 1992). *Boatner* was relied upon by the Tenth Circuit to deny Libretti the right to a finding of a factual basis for forfeiture.

Such takings must be afforded due process, however. When a forfeiture case is resolved against the property owner without a factual basis for forfeiture, it is a "taking" under the Fifth Amendment -- for, without a factual basis to "forfeit" an owner's right to just compensation for his private property, taken for public use, the government still owes the person "just compensation."

Forfeiture of estate

The wholesale forfeiture in this case is indistinguishable from the ancient practice of "forfeiture of estate," where a convicted felon automatically forfeited all his worldly possessions upon conviction of a felony. Our American system of capitalism depends upon the private ownership of property. Forfeiture of estate is automatic homelessness -- not only for the criminal defendant, but for his entire family.

With a criminal fine, on the other hand, the judge must consider the impact on innocent family members and the ability of the defendant to sustain himself, in setting the amount of the fine. 18 U.S.C. §3572(a).[8] Not so with forfeiture, at least as practiced to date. The courts give it all to the government in a blink, saying their hands are tied under the broad terms of the forfeiture statute.

The forfeiture of everything Libretti owned was decreed without regard to the proportionality requirement

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[8] 18 U.S.C. §3572(b) requires that a fine not impair the defendant's ability to make restitution. Under the forfeiture laws, the government is often able to profit from a forfeiture at the expense of a defendants' victims, when restitution is rendered impossible by the pretrial restraint and subsequent forfeiture of the defendants' assets.

of *Alexander v. United States*, __ U.S. __, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993).

Counsel for Libretti makes an excellent argument, under Rule 11 of the Federal Rules of Criminal Procedure, for reversal of the Tenth Circuit's opinion. We believe reversal is also mandated by the U.S. Constitution.

I

A Guilty Plea to a Substantive Count Requires a Meeting Of The Minds And The Defendant's Voluntary Relinquishment Of His Right To Trial

There are two ways a defendant's factual guilt to a count in the indictment may be established -- by trial, or

> by the defendant's own solemn admission "in open court that he *is in fact guilty* of the offense with which he is charged," *Tollet v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973) (emphasis added), *i.e.*, by a plea of guilty.

Henderson v. Morgan, 426 U.S. 637, 648, 96 S.Ct. 2253, 2259, 49 L.Ed.2d 108 (1976), Justice White concurring.

In *Henderson*, a mentally retarded defendant pleaded guilty to second degree murder, admitting during the entry of the plea that he killed the victim. However, during the Rule 11 colloquy, the judge failed to advise him that intent to kill was an element of the offense. There was no indication that the defendant's attorney had advised him of the elements of the offense.

At a later evidentiary hearing, the defendant testified he would not have pleaded guilty if he had known intent to kill was an element of the offense.

This Court reversed the conviction, holding:

> such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process."

Henderson, 426 U.S. at 644-645, 96 S.Ct. at 2257, quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859 (1941).

> [A]n admission by respondent that he killed Mrs. Francisco does not necessarily also admit that he was guilty of second-degree murder.
>
> There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent. In these circumstances it is impossible to conclude that his plea to the unexplained charge of second-degree

murder was voluntary. *Henderson*, 426 U.S. at 646, 96 S.Ct. at 2258.

The Court stated in a footnote:

> There is no need in this case to decide whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense; we assume it does not. Nevertheless, intent is such a critical element of the offense of second-degree murder that notice of that element is required. 426 U.S. at 647 n. 18, 96 S.Ct. at 2258 n. 18.

The same principles apply to the "property nexus" element in the forfeiture count. Criminal forfeiture under 21 U.S.C. §853 requires proof that either the property was proceeds of a drug offense or used to facilitate the drug offense, or that the property constituted an "interest in, claims against, [or] property or contractual rights affording a source of control over, the continuing criminal enterprise." 21 U.S.C. §853(a).

This additional element in the forfeiture count is sufficiently complex and obscure that a layman cannot be presumed to know and understand it without being advised by counsel or the court.

II

Criminal Forfeiture Is A Substantive Count Just Like Any Criminal Substantive Count, For Purposes of the Constitution

In the opinion below, the Tenth Circuit held that the due process required under Rule 11 and underlying constitutional principles for the waiver of rights at a guilty plea hearing do not apply to criminal forfeiture counts. The Tenth Circuit reasoned, with the acquiescence of Libretti's trial counsel, that

> criminal forfeiture under Section 853 is a part of the sentence, not a part of the substantive offense. *Libretti*, 38 F.3d at 528.

The court below also reasoned that Libretti may not have had a right to jury trial on the forfeiture count because

> "The Sixth Amendment never has been thought to guarantee a right to a jury determination [on punishment]." *Libretti*, 38 F.3d at 530, quoting *Spaziano v. Florida*, 468 U.S. 447, 459, 104 S.Ct. 3154, 3161, 82 L.Ed.2d 340 (1984).

That analysis is incorrect.

A criminal forfeiture count is not just "part of the sentence" but an actual substantive count that stands alone, and must be separately proven. Since it must be separately proven, it stands to reason that the right to trial on a forfeiture count must be independently waived.

The opinion below cites *United States v. Reckmeyer*, 786 F.2d 1216, 1222 (4th Cir.), cert. denied, 479 U.S. 850, 107 S.Ct. 177, 93 L.Ed.2d 113 (1986), which held:

> It is true that Fed.R.Crim.P. 11(f) requires the district court to inquire beyond the agreement to determine if there is a factual basis for the forfeiture of the assets. We agree with the reasoning of the Seventh Circuit in *United States v. Roberts* that "[t]he mere fact that the defendant has agreed an item is forfeitable in a plea agreement, does not make it so...." 749 F.2d 404, 409 (7th Cir. 1984), cert. denied, 470 U.S. 1058, 105 S.Ct. 1770, 84 L.Ed.2d 830 (1985).

The Fourth Circuit in *Reckmeyer* held that there was a sufficient factual basis for the forfeiture, since Reckmeyer had agreed in the plea agreement that his only significant source of income during the period in question was illegal drug proceeds.

Unlike Reckmeyer, however, Libretti had substantial legitimate income from his employment -- averaging close to $50,000 per year. There was no dispute that non-forfeitable assets had been seized. Nevertheless, the Tenth Circuit refused to follow the holding in *Reckmeyer*, stating that criminal forfeiture is merely punishment and not a substantive offense, and therefore there need not be a factual basis for the forfeiture.

The Tenth Circuit held that Libretti understood that he was forfeiting all his property, whether forfeitable or not, and that there was nothing improper about that. The court held that Libretti's plea "unambiguously

forfeited all his property." We disagree. The very words used by the Tenth Circuit show Libretti's interpretation of the plea bargain was reasonable.

> In this case, the district court thoroughly assessed whether defendant understood the consequences of the guilty plea. The court informed him that all property described in the CCE count of the indictment *could*[9] be forfeited.... Defendant only questioned the extent to which the $1,500,000 limit on forfeiture applied to future legitimate earnings. His attorney and the district court agreed that the $1,500,000 limit *applied only to products of drug transactions and not to legitimate future earnings*.[10] ...[The defendant] stated that he understood the consequences of his plea, including that all of his property *owned by reason of any drug transaction*[11] could be forfeited....
>
> Nothing in the record indicates defendant's plea would have been different if he had been questioned further about forfeitability of his assets. He intended to forfeit all of his property without requiring the

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[9] Note that the court did not say that all the described property *would* be forfeited -- but only that it *could be forfeited*. This implies that discretion would be exercised in the future as to which property would be forfeited.

[10] This could be construed to imply that nonforfeitable property would not be forfeited under the plea bargain.

[11] This phrase belies the intent to forfeit untainted assets.

government to prove the assets were forfeitable...

Further, defendant received a favorable plea agreement. *In exchange for forfeiting all of his property,*[12] the government recommended the minimum sentence of twenty years imprisonment and agreed to drop all other counts in the indictment... Defendant entered into the plea agreement after the government presented overwhelming evidence of his guilt. He now seeks the benefit of that bargain, but only to the extent it favors him. We will not require the government to undergo a fact-finding hearing and forego a substantial benefit of its bargain.

We hold that defendant is bound by the terms of the plea agreement.... in which he unambiguously forfeited all of his property. The district court's *extraneous statements that defendant was only forfeiting assets listed in the CCE count*[13] of the indictment

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[12] We are appalled at the suggestion that the courts should condone the forfeiture of untainted assets to "buy" a defendant a shorter sentence.

[13] We are puzzled by the Tenth Circuit's characterization of the trial court's statements as "extraneous." After all, the judge who accepted the plea is in a better position to judge the meaning of the parties. Also, the judge's remarks in the taking of the plea colored the defendant's understanding of his plea bargain -- as Rule 11 contemplates. The judge's role is to help the defendant understand his plea bargain, what he is giving up, and what he is getting in return. Thus, the trial judge's remarks are a legitimate part of the defendant's understanding of his plea agreement.

(continued...)

or from his drug trade do not establish that defendant did not knowingly and voluntarily forfeit all of his property. Rather, defendant agreed to forfeit all of his assets, including some that on their face had no connection with his drug dealings--e.g., "all bank accounts, investments, retirement accounts,"... Nothing in the agreement limits the forfeiture to those assets with an established factual basis for forfeiture. Defendant is also not limited to forfeiting only those assets directly related to the CCE conviction. Accordingly, the district court properly ordered on December 23, 1992, the forfeiture of all of defendant's assets based on defendant's written agreement and knowing and voluntary ratification of that agreement at the change of plea hearing. 38 F.3d at 529-530 (citations and footnotes omitted).

The Tenth Circuit not only held that it was not necessary to find a factual basis for the forfeiture, but went so far as to suggest that nonforfeitable assets could be traded by a wealthy defendant for a reduction in his term of incarceration. We believe the Tenth Circuit was wrong on both counts.

The Tenth Circuit rejected the holding in *Reckmeyer* by stating that criminal forfeiture is merely punishment, not a substantive offense. We believe the Tenth Circuit was wrong and the Fourth Circuit was right.

(...continued)

A. This Court Has Previously Recognized That Criminal Forfeiture Is a Substantive Count

This Court denied certiorari on the *Reckmeyer* case. But a related case, involving the forfeiture of Washington D.C. law firm Caplin & Drysdale's legal fees -- fees earned representing Reckmeyer in his criminal case -- *was* heard by this Court. *Caplin & Drysdale v. United States*, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).

Although this Court ultimately concluded, in *Caplin & Drysdale* ,that the Sixth Amendment was not violated when the attorneys fees of the defendants' counsel are forfeited, this Court made it clear that the power to forfeit is limited to property that is *made forfeitable* by statute:

> the Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering all *forfeitable assets*.

105 L.Ed.2d at 544 (emphasis added). The government's interest does not extend to the forfeiture of assets not made forfeitable by statute, and such property is available to the defendant to spend as he pleases.

> The forfeiture statute does not prevent a defendant who has *nonforfeitable assets* from retaining any attorney of his choosing.

105 L.Ed.2d at 541 (emphasis added).

More importantly, *Caplin & Drysdale* explicitly recognizes that criminal forfeiture "is a *substantive charge* in the indictment against a defendant," 105 L.Ed.2d 528, 543 n. 5 (emphasis added). Since criminal forfeiture is a substantive charge, its elements must be proven, the defendant has a right to a jury trial, and these rights may not be waived absent a Rule 11 query as to the count.

B. Characteristics of a Substantive Count of Criminal Forfeiture Under 21 U.S.C. §853

A criminal forfeiture count is not just "part of the sentence" but an actual substantive count that stands alone, and must be separately proven, just like any other criminal count.

The distinction between a "sentencing enhancement" and a criminal forfeiture count is substantial.

At sentencing, a judge may consider "relevant conduct" not charged in the indictment -- even conduct previously punished -- in enhancing a sentence, so long as the judge imposes a sentence "*within the legislatively authorized punishment range.*" *Witte v. United States*, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __ (June 14, 1995) slip op. at __. However, criminal forfeiture is not within the "legislatively authorized punishment range" of a criminal count that authorizes a fine and imprisonment. Even 21 U.S.C. §848(a) -- which authorizes imprisonment, a fine and "the forfeiture prescribed in §853" -- requires separate compliance with the procedures and substantive requirements of §853 before a forfeiture order may be entered.

A criminal forfeiture count must be included in the indictment in order for the forfeiture to be considered. Section 853(e)(1) only allows the temporary *restraint* of

assets prior to indictment, and only in rare circumstances.[14] Implicit in Section 853 is the requirement that, absent a count in the indictment "alleging that the property ... would, in the event of conviction, be subject to forfeiture under this section"[15] -- no property could be forfeited.

Unlike sentencing enhancements, a forfeiture count includes elements which must be proven at trial before the jury can return a verdict of forfeiture. In addition to a violation of a title 21 U.S.C. felony, 21 U.S.C. §853 requires proof of the property's nexus[16] to crime. Section 853(a) requires proof that the property sought to be forfeited is either: (1) proceeds of the criminal activity for which the defendant was convicted, (2) property used or intended for use to facilitate the violation, or (3) in the case of a person convicted of engaging in a continuing criminal enterprise, the defendant's "interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise."

Under Fed.R.Crim.P. 31(e) the jury must specifically determine which assets are forfeitable under

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[14] A preindictment restraining order is available only if the government shows a substantial likelihood of prevailing on the issue of forfeiture, and that the need to restrain the asset to preserve the availability of the property outweighs the hardship on opposing parties. Such a restraining order is only valid for 90 days. 21 U.S.C. §853(e)(1)(B). A temporary restraining order obtained without prior notice and opportunity to be heard, only if the government demonstrates, in addition to these requirements, that providing notice will jeopardize the availability of the property for forfeiture. A temporary restraining order is only valid 10 days. 21 U.S.C. §853(e)(2).

[15] 21 U.S.C. §853(e)(1)(A).

[16] Some jurisdictions require that there be a "substantial connection" to the criminal offense.

the facts of the case, and the standards of §853(a). Neither judge nor jury may decide to forfeit property unless a forfeiture count is included in the indictment and these requirements are met.

A defendant has a Sixth Amendment right to a jury trial on a criminal forfeiture count.[17] We believe that a forfeiture victim should also be afforded the right to counsel, either by releasing seized assets or providing court-appointed counsel at government expense. A decade of experience has shown that forfeiture victims are usually not qualified to represent themselves, and are no match for the superior resources of the federal government.

The elements of criminal forfeiture counts are not commonly known to laymen. This statute is new and complex. It had no counterpart in the common law. And forfeiture law has been constantly changing, often from one extreme to another, in the last few years.

Under the circumstances, Due Process demands that *at least* the defendant must be informed of the elements of the forfeiture count, and understand the consequences of the plea bargain before he can knowingly and voluntarily waive his right to trial on that count.

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[17] *See e.g. United States v. Garrett*, 727 F.2d 1003 (11th Cir. 1984).

III

Third Party Rights Are Undermined When the Court Accepts a Plea to a Criminal Forfeiture Count Without Ascertaining That There Is A Factual Basis For The Forfeiture

Part III of Libretti's brief deals with third party rights in Libretti's criminal forfeiture. This is an issue that particularly concerns F.E.A.R. Foundation.

Like civil forfeiture victims, third parties in criminal forfeiture cases are provided very little due process. Often they see their Constitutional rights lightly brushed aside for years while the court processes the rights of the criminal defendant.

After the criminal forfeiture case is finally resolved against the criminal defendant, who has presumably enjoyed at least some measure of due process in the forfeiture of his property -- the innocent, or at least uncharged, third party who owns an interest in the criminally forfeited property -- finally gets some semblance of "process" -- but certainly not the process which is his due under the Fifth Amendment "takings" clause.

21 U.S.C. §853(n) provides the only remedies available to innocent owners in the criminal forfeiture context. There is no right to a jury trial, and the burden of proof is on the property owner to show by a preponderance of the evidence that he either had a

superior interest in the forfeited property,[18] or that he was a bona fide purchaser for value without notice of the grounds for forfeiture.[19]

If the third party tires of waiting until the criminal case is over or runs out of money to defend his property, he loses without the government ever having to show a factual basis for the seizure.

This process does not comport with the due process required for the taking of private property for public use -- particularly when the government enjoys an exemption from the just compensation requirement.

The defective protection of the property rights of innocent third parties is all the more reason to require the government to show a factual basis for forfeiture -- before getting to the resolution of third party claims.

A criminal defendant has no incentive to defend the property of third parties. In the plea bargaining process, he would understandably be more willing to bargain away someone else's property than his own. When the courts encourage criminal defendants to buy their way out of a longer prison sentence by forfeiting assets, the assets of others will always prove tempting.

Third parties deserve better protection of their property rights.

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[18] 21 U.S.C. §853(n)(6)(A).

[19] 21 U.S.C. §853(n)(6)(B).

Conclusion

In order for a plea to be voluntary, it must be knowing. There must be a meeting of the minds as to what the defendant is getting and giving up in his bargain. There must be a determination by the court of a factual basis for the plea. None of those safeguards were provided here.

The due process requirements of Rule 11 are not burdensome on the government or the court. It is the least they should be expected to do to prevent unjust forfeitures in a legal setting so fraught with abuse.

For the foregoing reasons, *amicus curiae* Forfeiture Endangers American Rights Foundation respecfully requests that this honorable Court reverse the opinion below.

Respectfully submitted,

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